Supreme Court of the United States

OCTOBER TERM, 1942

No.

BURRUS MILL & ELEVATOR COMPANY OF OKLAHOMA,
Petitioner,

v.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, *Respondents.*

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The Findings of Fact and Conclusions of Law of the District Court (there was no opinion by the District court) are in the record at Pages 251 to 255. The opinion of the Circuit Court of Appeals has not as yet been reported; it is in the record at Pages 266 to 271.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code of the United States as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. Sec. 347(a)).

QUESTIONS PRESENTED.

The questions here presented are stated in the Petition (*ante* p. 4).

STATUTES.

There are no statutes involved.

SPECIFICATION OF ERRORS TO BE URGED.

These are indicated under the headings, "Questions Presented" and "Petitioner's Position" in the Petition (*ante* pp. 4-5) and in the Subject Index (*ante* p. i).

ARGUMENT.

Point I.

Because of Its Location in the Tariff, Item 20 Did Not Limit or Abrogate the Applicability of the 11 Cent Proportional Rate from St. Louis to Memphis.

Both the District Court and the Circuit Court of Appeals held that Item 20 limited or abrogated the 11 cent proportional rate from St. Louis to Memphis, which undoubtedly would otherwise have been the only applicable rate on the shipments in question. (Findings of Fact Nos. 13 and 14, R. 253; Opinion of the Circuit Court of Appeals, R. 268). These holdings entirely overlooked the fact, which is clearly upon the record, that Item 20 was so placed in the tariff that it could not operate to affect the 11 cent rate.

The tariff in question (Chicago, Rock Island and Pacific Railway Freight Tariff No. 34562) is Exhibit No. 17 (R. 115). Pages 14 to 18 of that tariff show at the top of each page "Application of Tariff" and it is under this heading that Item 20 appears. (R. 117.) Pages 22 and 23 are headed "Rates to Apply and Proportions to and from Transit Stations." (R. 119, 121.)

If Item 20 is to be construed as determining the rates to have been applied on the shipments involved herein, then

there was only one place in the tariff where it could be placed to have that effect, and that is with those items which appear on pages 22 and 23, for they appear to be a complete unit in themselves.

On page 23 of the tariff (R. 121) there appears Item 735 which reads as follows:

> "That portion of Item No. 600 providing that rate from transit point to destination or from point of origin to transit station will govern where higher than the rate in effect from initial point of shipment to destination will be waived on the following shipments:
>
> ORIGIN TERRITORY
>
> 1—Originating at points in Kansas and destined points referred to in paragraph 4.
>
> 2—Moving on proportional rates from Missouri River points (see Index Nos. 9975 to 9983, inclusive) and destined points referred to in paragraph 4.
>
> 3—Moving through Missouri River points (see Index Nos. 9975 to 9983, inclusive), and destined points referred to in paragraph 4."
>
> DESTINATION TERRITORY
>
> 4—To destinations in or moving through Arkansas, Louisiana and Texas, and to or through Memphis, Tenn."

Item 20, if it was to have the effect imputed to it by both of the lower courts, should either have been referred to in Item 735 or made a part thereof. This follows because Item 735 provides that shipments moving through Missouri River points and destined to points east of Memphis would be charged the rate from St. Louis to Memphis, *irrespective of the fact that the rate to or from the transit point may have exceeded the rate to Memphis.*

Pages 22 and 23 purport to contain the complete provisions of the tariff for the rates to be applied. Anyone attempting to determine what rate a shipment would carry would be justified in assuming that complete information

would there be given. Yet there is no reference to Item 20, and it would be only by merest chance that anyone would see Item 20, located as it is in an entirely different part of the tariff, where it does not belong and under a different heading. The respondents, although it was their own tariff, did not find Item 20 for two days after their first quotation. (Telegram of August 7, 1935. R. 59.)

The location of a rule in a tariff is most important because "the rule fixes the rate". As the Interstate Commerce Commission stated in *Furnishing Ice and Salt for Protection of Perishable Freight,* 88 I. C. C. 361 at page 363,

> "The location of a rule in a tariff must be considered in determining the correct application of the rule."

It must be so located as to be read with other pertinent parts of the tariff or it might just as well not be printed. As was said in *Chamber of Commerce* v. *I. & G. N. Ry. Co.,* 32 I. C. C. p. 47 at pp. 255:

> "Rates should be published in such a way as to apprise shippers of their existence."

The same principle applies to rules.

The reason for the principle is obvious; if tariffs provisions can be isolated and hidden under headings where no one would expect to find them, then tariffs become traps for the unwary and shippers never know what rates they must pay.

Point II.

Under the Express Language of the Respondents' Tariffs the 11 Cent Rate Was Applicable With Transit Privileges at Enid and Kingfisher.

The size of the record in this case would give the idea that the case contained many questions of law and fact. This is because so many extraneous matters, as for instance, the Interstate Commerce Commission's investigation into the grain rate structure, Docket No. 17000, have been in-

jected into the case. There is really but one question and that is what rate applied on these shipments and the answer to that is to be found only by finding what was the applicable rate published in the tariffs of the respondents. This is the only rate that could legally be charged regardless of whether it was high or low, reasonable or unreasonable. So long as it was the published rate, it was the rate which the respondents were bound to charge and the petitioner was bound to pay. Interstate Commerce Act, Sec. 6(1); *Kansas City Southern Ry. Co.* v. *C. H. Albers Commission Company,* 223 U. S. 575.

Thus the only tariff item which was confusing and open to more than one construction was Item 20 of the Rock Island tariff No. 34562 (Ex. 17, R. 117.) That it was confusing and was open to more than one construction is abundantly proved by matter in the record, e. g., Exhibits 26, 27 and 28. (R. 180 to 227.)

There is no dispute as to the fact that the claimed 11 cent rate was legally applicable if the shipments had simply moved from St. Louis to Memphis over the line of the respondents through Kansas City, Enid, Kingfisher, Little Rock, etc., or if the milling had been done beyond St. Louis or beyond Memphis. (Stipulation of Facts, R. 62.) Nor would there have been any question of the applicability of the 11 cent rate with transit privileges at Enid and Kingfisher if the respondents had had a "by pass" around Kansas City and the cars would never have entered the railroad yards at that point. Since, however, the shipments were given transit privileges at Enid and Kingfisher, the controlling question is: Did Item 20 of the respondents' tariff referred to above plainly require respondents to charge the combination rate of 34 cents, the sum of the 14 cent rate from St. Louis to Kansas City and the 20 cent rate from Kansas City to Memphis?

There can be little doubt but that Item 20 was intended to provide that when shipments of grain or grain products moved from one terminal market to another through a

third market, that shipments would be made from the intermediate third market on the proportional rate instead of on a balance of a through rate that applied through that intermediate market. To illustrate, on page 486 of the Commission's decision in Docket No. 17000, Part VII, *Grain and Grain Products Within the Western District and For Export*, 205 I. C. C. 301. (Ex. 10, R. 79), will be found rates; from Omaha to St. Louis, 13 cents; from Omaha to Kansas City, 6 cents; from Kansas City to St. Louis, 11 cents. It was clearly intended that if a Kansas City mill should bring in grain from Omaha and ship its products to St. Louis, it would have to pay the combination rate of 6 cents into Kansas City and 11 cents out to St. Louis, or a total of 17 cents, instead of taking transit at Kansas City on the 13 cent through rate which applied from Omaha to St. Louis through Kansas City (6 cents in and 7 cents out). To meet such a rate break system, it was necessary, of course, to have a general rule to apply at all of the markets from which proportional rates were published as listed in the table on page 486 of the decision referred to.

An examination of the tariff involved in this controversy which contains this rule shows first on its title page (R. 115) that the transit privileges provided therein were applicable at stations on the respondents' line in Arkansas, Colorado, Kansas, Louisiana, Nebraska, Oklahoma, also at Memphis and Missouri River points and at stations on the Rock Island in Texas. It necessarily follows, then that Item 20 was framed to fit the general situation and that it was applicable at Missouri River points, such as Kansas City, as well as interior mill points, such as Enid and Kingfisher.

In reading Item 20 in an effort to determine its effect upon the applicability of the 11 cent proportional rate from St. Louis to Memphis, it is observed that shipments passing through points from which proportional rates were published shall have been charged a combination of rates to and from each proportional rate point on the route of move-

ment. This is a provision in a transit tariff and, of course, related only to shipments accorded transit.

Tariffs are construed like contracts and statutes, that is to arrive at the sensible meaning of the words employed. *Boone* v. *U. S.*, 109 F. (2d) 560; *Great Northern Ry. Co.* v. *Delmar*, 43 F. (2d) 948; *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. Language used therein is to be given a reasonable and not an absurd construction, but where ambiguities occur, they will be construed against the party writing them. *Southern Pac. Co.* v. *Lothrop*, 15 F. (2d) 486; *Updike Grain Company* v. *Chicago & N. W. Ry. Co.*, 35 F. (2d) 486; *Atlantic Coast Line Ry. Co.* v. *Atlantic Bridge Co.*, 57 F. (2d) 654. The construction asserted by respondents and approved by the lower courts results in a preposterous and absurd conclusion, if carried to its logical end.

The effect of this language was to charge twenty-three cents per hundred pounds for the privilege of stopping these cars of wheat in transit to mill them into flour, a privilege ordinarily given free—and given free in the very tariffs involved here. This is admitted by the respondents in this language (R. 196):

> "The net result of the assessment of the foregoing charges was equivalent to assessing a charge for stopping the shipments in transit at Kingfisher of 23¢ per 100 pounds on the shipments going to Memphis for beyond."

In other words, the effect of this 23 cent additional charge is to make the rate three times what it would have been (11 cents) if the grain had not been stopped in transit or if the transit privilege had been taken beyond St. Louis or beyond Memphis.

Next, consider the words in Item 20, "from which proportional rates are published." Do these rates indicate that if proportional rates were published from Kansas City to San Francisco that only the combination on Kansas City

must have here been applied? This item should be read as if it stated that the proportional rate (from Kansas City) would have to have been in effect to the final destination of the grain or its product. There was in effect a proportional rate from Kansas City to Memphis, which was at no time the destination of the wheat or the product, but there was no proportional rate from Kansas City to Knoxville (for example, the destination of part of the grain shipments in controversy) unless it be that the combination of the proportional rate from Kansas City to Memphis, plus a local rate from Memphis to Knoxville could be considered as a proportional rate from Kansas City to Knoxville. If that construction is adopted, then the absurd conclusion follows that a point having only one proportional rate has a proportional rate to every town in the United States or even beyond.

Proportional rates which are often used for equalizing purposes or for tariff simplification may be proportional on the origin end, meaning that the grain must have had a prior rail haul to be entitled to such proportional rate, or, may be proportional on the destination end, indicating that shipments must receive a subsequent rail haul to be entitled to the proportional rate.

In the first sentence of Item 20 (R. 117) it was said that if the shipments passed through more than one point from which proportional rates were published, the charge would have been the combination of rates to and from each proportional rate point on the route of movement.

As shown in Ex. 21 (R. 147-167) proportional rates were published from Enid, Kingfisher, El Reno, Oklahoma City, and, in fact each and every station on the Rock Island line from the Kansas-Oklahoma line north of Renfrow to the last station in Oklahoma, near the Oklahoma-Arkansas border, east of Howe.[1] So that one construction of Item 20

[1] Enid is in origin Group 632 (R. 151), Memphis is in group 74-B (R. 157). The local rate from group 632 to group 74-B is 34 cents (R. 163). The proportional rate from group 632 to group 74-B is 30 cents (R. 167).

must be that (where transit was taken) combinations would be made of the rate from St. Louis to Kansas City plus the rates from Kansas City to Renfrow, Renfrow to Medford, Medford to Jefferson, Jefferson to Pond Creek, Pond Creek to Kremlin, Kremlin to North Enid, North Enid to Enid, and so on all around the circle until it got to the Arkansas-Oklahoma line. There are 44 of these stations (proportional rate points) which would mean about 45 combinations to be added together to determine the rate to be charged if transit were taken at Enid, Kingfisher, or any other intermediate point.

If Item 20 means that the combination must have been applied on shipments "passing through a point from which proportional rates were published," regardless of whether the rates are proportional on the origin end or proportional on the destination end, then it is clearly evident that respondents have not applied the legally published rate on any of the shipments involved.

The respondents concede in Paragraph 10 of the stipulation (R. 50) that they have never construed Item 20 to prohibit the application of through rates with transit on this traffic. The typical car set out in the stipulation serves as an example. When that wheat moved from St. Louis to Enid, (for Storage) respondents collected the rate into Enid. When that wheat was later moved from Enid to Kingfisher, the stipulation recites that petitioner paid no freight charges for its transportation from Enid to Kingfisher (R. 53). The stipulation there recites:

> "Plaintiff has not paid any freight charges to defendants for the transportation of this shipment from Enid to Kingfisher. The proportional rate from St. Louis to Enid was the proportional rate from St. Louis to Kingfisher."

Similarly, Exhibit 27, Sheet 2 of Exhibit 1 attached to the Special Docket application shows "Rate and Amount" from Enid to Kingfisher as "free" (R. 201).

If Item 20 meant that on a shipment from St. Louis to Memphis, milled at Kingfisher or stored at Enid, the Kansas City combination of 34 cents must be collected, then the same item certainly meant that on a shipment of wheat from St. Louis to Kingfisher, stored at Enid, the combination on Kansas City would also have to be applied, namely, 14 cents from St. Louis to Kansas City and 20 cents from Kansas City to Kingfisher.

Certainly, Item 20 cannot be read one way when Enid was the transit point and Kingfisher the destination and another way when Kingfisher was the transit point and Memphis the destination. In the exchange of telegrams (Stipulation of Facts, Par. 15, R. 59) it is stated that on August 5, 1935, the respondents construed the tariffs to permit transit at Kingfisher on the 11 cent rate. On August 7 respondents wired petitioner's representative that they "now find Item 20 * * * requires protection Kansas City combination." Many months later as shown in the Stipulation of Facts (Par. 10, R. 53) on January 8, 1936, when the three cars of wheat which had been stored at Enid moved on to Kingfisher, respondents did not regard Item 20 as prohibiting a through rate with the transit privilege at Enid when the destination was Kingfisher. The respondents placed a different construction on Item 20 in the case of wheat accorded transit at Enid from that in the case of wheat accorded transit at Kingfisher.

The exception of Item 20 did not have the effect of making any rate other than the 11 cent rate applicable to the shipments in question. This exception (R. 117) was evidently intended to prevent multiple combinations. Manifestly it must have been considered in connection with the through charge from origin of the wheat to the final destination of the flour because it referred to combinations of rates and not to any particular factor.

It was intended to apply to a situation such as this (Stipulation of Facts No. 10 and 10½, R. 50-57) where wheat originated in Ridge Farm, Illinois and moved into St.

Louis; from there moved on the proportional rate of the Rock Island to Memphis (around through Kansas City and Kingfisher) and the product finally moved from Memphis to Knoxville. The exception must have meant that where the lowest combination of rates via a route to and from one proportional rate point (St. Louis) had been published for application over another route which passed through one or more proportional rate points (St. Louis, Kansas City, Enid, Kingfisher, Oklahoma City, etc.) transit may have been given at intermediate points on the latter route on the basis of the lowest rate applicable, which of course means the lowest rate applicable from Ridge Farm Illinois to Knoxville through St. Louis, as claimed herein.

If the exception stopped there, there would be no question that the 11 cent rate claimed herein would have been applicable with transit, on all the shipments involved herein which were accorded transit at Enid and Kingfisher. However, there is also the last sentence, which reads, "The transit point shall be intermediate on the route first described." (Actually no route was "first described.") If the transit had been taken at a point between Ridge Farm, Illinois, and St. Louis or at a point east of Memphis (such as Alton, Illinois, or Chattanooga, Tennessee), the through rate which petitioner contends for herein would have been clearly applicable. If the transit had been taken at Alton, Illinois, or Chattanooga, Tennessee, it would have been at a point "intermediate on the route first described."

This raises the question as to whether Enid or Kingfisher were on another route from Ridge Farm, Illinois, to Knoxville, Tennessee. The record shows that other routes were open at that time from St. Louis to Memphis, carrying the traffic through Kansas City, Enid and Kingfisher. (Exhibit 2, R. 81-107.)

The 11 cent rate was not only published over the line of the Rock Island from St. Louis to Memphis but also was published over the line of the Rock Island from St. Louis to Brinkley, Arkansas, and thence over the St. Louis South-

western beyond, both of which routes were through Enid and Kingfisher. The exception to Item 20 provided for transit at those intermediate points which were on more than one route, and since Enid and Kingfisher were on two routes from St. Louis to Memphis, they were entitled to transit on the lowest combination of rates from Ridge Farm, Illinois to Knoxville, Tennessee.

Tariff 225 (Ex. 12, R. 81 to 107), in addition to naming a proportional rate of 11 cents per hundred from St. Louis to Memphis, also carried a proportional rate of 11 cents from St. Louis to Helena, Arkansas,[2] when routed over the line of the respondents from St. Louis through Enid and Kingfisher to Wheatley, Arkansas and thence over the line of the Missouri & Arkansas Railroad to Helena. This rate was proportional on the origin end and the destination end as well, as it was restricted to shipments moving to points east of the Mississippi River, and obviously was published to bring about an equalization of rates from the origins beyond St. Louis to the final destinations in the southeast, thorugh the two River Crossings of Memphis and Helena.

It is therefore seen that, in addition to the route previously mentioned in connection with the St. Louis-Southwestern, there was also a route through the Helena gateway. (See Item 90, R. 279.) There were thus a total of three routes from origins to final destinations through the transit points of Enid and Kingfisher, and therefore within the exception to Item 20 previously referred to, and especially the last sentence in Item 20 which provided that the transit points must have been intermediate on more than one route. Item 20 soon became so troublesome that it was shortly cancelled out. (R. 233)

From the foregoing, we submit, it logically follows that the 11 cent rate was the only rate which could apply on the shipments involved.

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[2] Group 70-B (R. 99).

Point III.

The Tariffs of the Respondents Governing the Shipments in Controversy, Viewed in the Most Favorable Light to the Respondents, Are Ambiguous, and Therefore Require the Application of the 11 Cent Rate Under the Rule that Ambiguities in Tariffs Must be Resolved in Favor of Shippers.

Tariffs are required to be clearly written so that those dealing with them may be apprised of the applicable rates and this is especially true where, as here, the attempt is made to restrict the application of certain rates. In *Henry Lichtig & Company* v. *Missouri Pacific,* 190 I. C. C. 229, the Interstate Commerce Commission said:

> "We have consistently pointed out that if it is the purpose to restrict the application of rates over any particular route and transit service in connection therewith to a certain point or points, it should be done by clear and unequivocal language."

Highly similar language is used in *Rea-Patterson Milling Company* v. *Missouri Pacific,* 196 I. C. C. 323, 324. Both of these cases involved transit rates on grain and grain products as does the instant case. Certainly the tariffs before the Court do not meet the test announced by the Commission as they do not in "clear and unequivocal language" provide for any restriction in the application of rates over the particular routes in question.

As appears in paragraph 11 of the amended complaint (R. 39) and the stipulation (R. 47 *et seq.*), petitioner shipped the first car from Kingfisher to a point beyond Memphis on August 3, 1935 (R. 13, Line 1), and was compelled to pay thereon the sum of 34 cents per pound for the haul from St. Louis to Memphis. Two days later, August 5, 1935, a wire was sent respondents, reading as follows (R. 59):

> "Are we correct understanding transit available Kingfisher Oklahoma on rate eleven cents Saint Louis to

> Memphis for beyond page fifty three Johanson tariff two two five and item seven thirty five your transit tariff three four five sixty two."

In reply, the respondents wired as follows (R. 59):

> "Retel and conversation date subject to requirements item one ten Johansons tariff two two five your understanding correct."

Then four more cars of flour were shipped on August 5th (R. 13, Lines 2 to 6). Petitioner also at the same time bought 25,000 more bushels of wheat (R. 68), and on August 6th, bought an additional 100,000 bushels (R. 66, 67, 69. Then on August 7th, respondents wired that they regretted that they had misconstrued the tariff, using this language (R. 69):

> "Correction our wire fifth. Regret now find item twenty tariff three four five six two requires protection Kansas City combination thirty four cents on grain St. Louis to Memphis via Rock Island."

Of course, even though petitioner acted upon such telephone conversation and wires, to its extreme detriment, the point of estoppel is not being here made. We point this situation out as strong argument in support of our contention that the tariff was certainly ambiguous from an examination of the conduct of respondents themselves, who could not construe the tariff twice alike in several days' intervening time. Yet it was their own tariff they were attempting to construe.

Purchasers of wheat and sellers of flour can not be expected to take weeks and months to determine the applicable rate; they must rely upon their traffic manager to give them the necessary information while the wholesale baker is holding the long distance telephone. After the purchase and sale have been consummated and confirmed, the shipper has no way of avoiding his contract. For those reasons among others, tariffs should be clear and unambiguous if a shipper is to remain solvent and stay in business. This is

a case where a relatively small flour mill company in Oklahoma might lose $25,000 in one transaction, notwithstanding the fact that it had experienced traffic men in its employ and had used every precaution by not only getting the confirmation from the railroad by long distance telephone, but having it verified by telegraph (R. 59).

The Courts and the Commission have long recognized the familiar rule that in case of ambiguity the tariff must be construed against the framer. *Northwest Steel Company et. al.* v. *Director General, as Agent, Oregon Washington Railroad & Navigation Company et al.*, 68 I. C. C. 195, 198. The rule is well stated in *Atlantic Coast Line R. R. Co.* v. *Atlantic Bridge Co., Inc.*, 57 F. (2d) 654, wherein the court said:

> "Tariffs, like statutes, have the force of law; like statutes, they must be expressed in clear and plain terms, so that those dealing with and governed by them may understand them and act advisedly. *Swift* v. *U. S.* (C. C. A.) 255 F. 291. They may not be contrived in catchpenny terms to catch the ignorant and unwary. If they are ambiguous, or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit. *Southern Pac.* v. *Lothrop* (C. C. A.) 15 F. (2d) 486; *American Ry. Express Co.* v. *Price Bros.* (C. C. A.) 54 F. (2d) 67; *U. S.* v. *Gulf Refining Co.*, 268 U. S. 543. * * * It is equally clear that a carrier may not, under a tariff couched in general terms, which if interpreted in one way, will produce a higher, in another a lower, rate, insist upon the interpretation which gives it the higher rate. In short, in a situation of that kind, the shipper who has to pay the freight may call the tune."

The rule concerning the construction of ambiguous tariffs favorably to the shipper is so well established it would be supererogation to give more citations from this Court, the lower Federal Courts and the Interstate Commerce Commission.

We submit that the facts appearing of record and fully set forth in the statement in the petition (*ante* pp. 1-4) and the discussion under Point II (*ante* pp. 10-18) fully demonstrate that there was ambiguity in the tariff and that the ambiguity was so "substantial" that neither the shipper nor the carrier could be certain of the rate which applied on the shipments. To refuse to acknowledge the ambiguity and to construe the tariff favorably to the shipper as the Circuit Court of Appeals did here is to disregard a principle which has been firmly established in our federal jurisprudence for over half a century.

CONCLUSION.

The decisions of the District Court and the Circuit Court of Appeals are clearly erroneous and should be reversed.

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